No. 79-1944

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

J. TRUETT PAYNE, INC., a Corporation
Petitioner,
vs.
CHRYLSER MOTORS CORPORATION, a Corporation
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND
BRIEF OF HASBROUCK, ET AL. AS AMICUS CURIAE URGING REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

This motion for leave to file a brief *amicus curiae* is presented on behalf of Ricky Hasbrouck and eleven other Texaco brand service station dealers who are appellants in the Ninth Circuit appeal of *Hasbrouck, et al. vs. Texaco,* 1980-2 Trade Cases para. 63,343 (E.D. Wn. 1980) (9th Cir. filed April 29, 1980), hereinafter referred to as Hasbrouck, et al. The above individuals hereby respectfully move for leave to file a brief *amicus curiae* in this case in support of petitioner, J. Truett Payne, Inc., as provided in Rule 36 of the Rules of this Court. The consent of the counsel for the petitioner was obtained. Counsel for respondent, Chrysler, has declined to consent. The basis for this motion is the following:

1. Hasbrouck, et al., are or were individual Texaco brand service station dealers in Spokane, Washington. The issues involved in *Hasbrouck, et al. v. Texaco* are identical to the issues involved in this case. Hasbrouck, et al., alleged that Texaco unlawfully discriminated in price against them in violation of the Robinson-Patman Act, 15 U.S.C. §13 because for seven and one-half years, Texaco sold identical gasoline at substantially lower prices to two favored customers who operated competing retail gasoline stations in the Spokane, Washington, market. Following a four-week trial, the jury found Texaco had violated the Robinson-Patman Act and awarded separate verdicts for each plaintiff totaling $849,484.00 before trebling. On the motion of Texaco, the District Court

entered judgment for Texaco notwithstanding the verdict and the appellants have appealed that decision to the Ninth Circuit. The appellants' brief was filed in the Ninth Circuit on October 16, 1980. Texaco has requested an extension of time to file their brief until January 23, 1981. The basis for the Court granting the judgment notwithstanding the verdict was its conclusion that it had erroneously instructed the jury based upon *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). The *Fowler* court held and the trial court instructed that the amount of the price discrimination can constitute a business injury under the antitrust laws entitling the plaintiff to recover the amount of the discrimination.

The District Court relied upon *Chrysler Corp. v. J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979), *cert. granted* 49 L.W. 3207, Oct. 7, 1980, for the proposition that this Court through its decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), has rejected and impliedly overruled *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947), *Fowler v. Gorlic, supra,* and other decisions allowing private litigants to recover the amount of the discrimination as damages.

2. The respondent Chrysler, in its Brief in Opposition to the Petition for a Writ of Certiorari cited *Hasbrouck, et al., supra,* for the proposition that *Fowler v. Gorlick, supra,* was no longer the law in the Ninth Circuit. Chrysler made this argument in support of its contention that there is no longer a conflict within the circuits on the issue of the proper measure of damages in a Robinson-Patman Act case. The Hasbrouck plaintiffs have an interest in responding to the position taken by Chrysler and refuting the argument that *Fowler v. Gorlick, supra,* and its source *Bruce's Juices v. American Can Co., supra,* are not the law in the Ninth

Circuit or the United States.

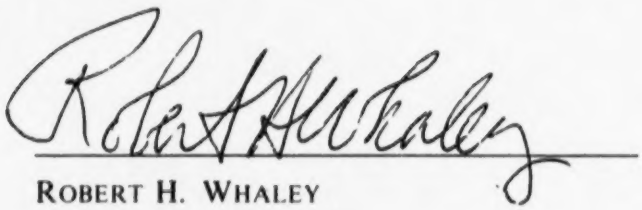
3. The grant of certiorari by the Court in this case emphasizes the fact that it raises questions of national significance concerning the availablility of a private remedy under the Robinson-Patman Act once a violation of the Act has been established. As appellants in the Ninth Circuit under similar circumstances, the Hasbrouck plaintiffs will be directly and seriously affected by the decision of this Court. The petitioner will necessarily concentrate on the particular facts of his own case. In the Brief tendered with this Motion, Hasbrouck, et al., will concentrate on showing that the rule of *Payne v. Chrysler,* imposes an impractical and unrealistic measure of damages in a private antitrust case which is insurmountable in most industries. Hasbrouck, et al., will demonstrate that the amount of the discrimination constitutes a direct business injury which is a proper measure of damages under the Robinson-Patman Act. Finally, *Hasbrouck, et al.,* will illustrate to the Court the drastic effects which will result to private enforcement of the Robinson-Patman Act, should the Fifth Circuit decision be upheld.

4. The important issues presented by *Payne v. Chrysler* should be considered in light of their affects on other industries such as the retail gasoline industry where price discrimination has alarming and disastrous consequences. The record in *Hasbrouck* graphically illustrates the consequences of these issues.

5. For the foregoing reasons, the motion for leave to file the attached brief as *amicus curiae* should be granted.

DATED this 20 day of November, 1980.

Respectfully submitted,



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[1]Pursuant to Rule 36, Paragraph 3, Counsel for Petitioner J. Truett Payne has consented to the filing of this Brief. Counsel for Respondent Chrysler has declined to consent.

QUESTIONS PRESENTED

This case presents serious questions which go to the very heart of the private enforcement of the antitrust laws and the standard of proof required under the Robinson-Patman Act. The questions presented necessarily include the following:

1. Whether the amount of the discrimination can properly be made the basis for an award of damages under the Robinson-Patman Act where there is a finding by the jury of a violation of the Robinson-Patman Act.

INTEREST OF AMICUS CURIAE

The appeal of the case of *Hasbrouck, et al., v. Texaco,* 1980-2 Trade Cases para. 63,343, (E.D. Wn. 1980) (9th Cir. filed April 29, 1980) No. 80-3160, will more than likely be decided by this Court's opinion in this case. The procedural position of the Hasbrouck plaintiffs, however, is somewhat different than that of *Payne.* In *Payne,* the Fifth Circuit Court of Appeals never addressed the liability issues raised by Chrysler, because it ruled as a matter of law that the damage proof of *Payne* had been insufficient. The liability issue in *Payne* remains unresolved. In *Hasbrouck, et al.,* the jury's findings of liability under the Robinson-Patman Act was not disturbed by the District Court and the liability issue has not been appealed by Texaco. Thus, the question of Texaco's violation of the Robinson-Patman Act is not an issue. The *Hasbrouck* Court reversed the jury's verdict solely on the issue of damages, ruling as a matter of law that the amount of discrimination wrongfully paid by the plaintiffs could not be used as a measure of damages. The District Court's reversal of the jury's award of damages

relied in substantial part upon the Fifth Circuit's decision in *Payne v. Chrysler, supra.* Another difference also exists in the two cases. In *Hasbrouck, et al.,* the jury was instructed that if the jury found an unlawful price discrimination, the jury could, (but was not required to) consider the unlawful discrimination as constituting business injury. The jury was also instructed that the amount of the discrimination alone could properly be awarded as damages; contrary instructions were given in *Payne.* The jury in *Hasbrouck, et al.,* returned a verdict in an amount less than the total amount of discrimination proven. In *Payne,* the jury returned a verdict in excess of the amount of discrimination proven.

The above procedural and legal differences in the record between the Hasbrouck plaintiffs and *Payne* emphasize the special interest of the Hasbrouck plaintiffs in sustaining the legal principle that the amount of unlawful price discrimination proscribed by the Robinson-Patman Act is a direct business injury and secondly, can properly be awarded as damages by a jury after the violation of the Robinson-Patman Act is shown.

The *Hasbrouck* Court in reversing the jury's verdict, committed the same error as was committed by the Fifth Circuit in *Payne.* It held that in order to recover, even after proof of a violation, the plaintiff must prove the amount of lost sales to the favored customer and cannot recover the amount of discrimination wrongfully paid. The Fifth Circuit's decision was relied upon by the *Hasbrouck* Court in reversing the plaintiff's verdict, and was cited as authority for ignoring the Supreme Court's decision in *Bruce's Juices, Inc. v. American Can Co.,* 330 U.S. 743 (1947) and the Ninth Circuit's decision in *Fowler Mfg. Co. v. Gorlick,* 415 F.2d 1248 (1969), *cert. denied* 396 U.S. 1012 (1970). Chrysler has cited

Hasbrouck in opposition to the Petition for Certiorari as reflecting the present state of the law in the Ninth Circuit. To attempt to correct the impact of *Payne*, the Hasbrouck plaintiffs are seeking leave to file this brief as a friend of the Court.

STATEMENT OF FACTS

The District Court in *Hasbrouck, et al.*, and the Court of Appeals in *Payne* improperly concluded that there was insufficient evidence establishing damage to the plaintiffs. Therefore, an understanding of the facts pertaining to the injury to competition and damage is necessary in this brief.

During the seven and one-half (7½) year period of time for which damages were sought, the plaintiffs in *Hasbrouck, et al.*, were operators of Texaco retail gasoline stations in Spokane, Washington. Each purchased gasoline from Texaco at a price based upon "retail tank wagon." During the same period of time, Texaco granted substantial discounts off the retail tank wagon price to two favored purchasers which operated Texaco branded and unbranded stations in Spokane in competition with the plaintiffs. The amount of the discount granted to the favored purchasers varied from 2.65 cents to 6.0 cents per gallon of gasoline. The favored purchaser stations generally posted retail prices significantly lower than the plaintiffs and many times posted prices which were at or near the purchase price that the plaintiffs had to pay Texaco.

The retail gasoline market in Spokane was characterized by strong competition and low profit margins. Except in the most unusual circumstances, a station's retail gasoline price was the most important factor to its success. According to Texaco's own dealer

training manual, the amount of a station's non-gasoline sales (such as sales of tires, batteries and accessories), depended upon the size of its gasoline sales. Because of Spokane's relatively small geographic size and the pattern of its streets, the city has substantial cross-city traffic and there was effective competition between stations over relatively broad areas. Price changes in one part of Spokane moved and affected other parts of the city.

There was direct evidence of competition between the plaintiffs' stations and the favored stations including the existence of price zones which contained both the plaintiff stations and stations operated by the favored purchasers. Price zones were created by Texaco to include stations in a defined geographic area which directly competed for the same customer because of localized traffic patterns. While it was impossible for the plaintiffs to prove where former or potential customers purchased their gasoline, several plaintiffs identified specific customers which had traded with them and which now appeared to be trading with the favored purchaser.

The plaintiffs responded to competition from the favored favored purchasers in various ways. Some recognized that without the same buying price they could not post a low enough retail price to compete effectively on a price basis, and elected to keep their retail prices high in an effort to earn maximum profits on each gallon sold. Others converted their stations in whole or in part to self service operations and attempted to match the favored purchaser's prices; but in so doing, they lost money because of having to pay a higher purchase price. Others reduced their prices as much as possible, but not so far as to operate at a loss. These dealers found that their lower retail price was not low enough to substantially increase their gallonage. All of the plaintiffs, recog-

nizing they were unable to compete effectively on price, tried other means to compete. They worked extremely long hours, gave extremely good service, and invested in other inducements to attract customers (e.g. truck rental services, ice machines, etc.).

Texaco knew that dealers like the plaintiffs were at a competitive disadvantage with the favored purchasers. This knowledge was highlighted in a Texaco marketing department report which discussed favored purchasers who were retailing gasoline on a self-service basis. Texaco concluded in this report that independent retailers (such as the plaintiffs) who converted to self service but who paid the retail tank wagon price could be competitive with favored purchasers only to a degree, and that disfavored purchasers retailing with a partial self service operation could not be sufficiently competitive to maintain sales in the long term.

The result of this competitive situation was startling. Between 1970 and 1975, the sales volume of one of the favored purchaser's almost tripled whereas during the same period the volume sold to independent Texaco dealers such as the plaintiffs declined approximately 30 percent. This same favored purchaser's volume accounted for only 20.7 percent of the Spokane District retail marketing volume in 1970. Four years later, its share of the same market had grown to almost 50 percent. The share of the directly supplied retailers like the plaintiffs, declined from 76 percent to 42 percent during the same period. The eight stations of this favored purchaser were outselling nineteen stations such as the plaintiffs'. By the end of the seven and one-half year period, 7 of the 13 plaintiff stations were closed.

The evidence included startling admissions from Texaco's own executives acknowledging the devastating impact the favored

purchaser's price advantage had upon the sales of independent retailers such as the plaintiffs. The Texaco vice president in charge of marketing acknowledged that a favored purchaser who operated at retail could charge substantially lower prices than stations such as the plaintiffs' and that this factor had caused a "rapid and alarming" shift in volume away from independent retailers and increasing sales by favored purchasers.

The District Court's opinion in *Hasbrouck, et al.,* required the plaintiffs to measure the amount of the shift in volume of sales away from their stations to the favored purchaser. Even though the loss of sales had been proven in general, the Court would not permit recovery of damages except for the specific sale which could be proved to have been lost. Such a burden of proof was impossible in a market with multiple purchasers, sellers, and substitute products and where no records of each lost sale and purchaser for the seven and one-half year period exist.

The District Court instructed the jury that if the jury found unlawful price discrimination, then the jury could, but was not required to, consider the unlawful discrimination as constituting business injury:

> "With respect to this requirement of proving the fact of damage to the plaintiffs, if you find that Texaco did unlawfully discriminate in price against the plaintiffs without legal justification, you may consider that the discriminatory price may constitute business injury."

This instruction was later found by the District Court to have been given in error although it was based upon the holding of the Ninth Circuit's opinion in *Fowler Mfg. Co. v. Gorlick, supra,* and that opinion's analysis of this Court's opinion in *Bruce's Juices, supra.*

This "fact of damage" instruction was followed by a separate causation instruction which clearly stated that the jury had to find that the price discrimination "has been a proximate cause of substantial injury to the plaintiff's business or property" and further described proximate cause in detail. The Court gave the jury a rigorous causation standard, instructing the jury that the plaintiff's injury must be substantially attributable to the discrimination. The Court also instructed the jury that it could find damages in the amount of the discrimination as permitted by *Fowler* and *Bruce's Juices.* Following these rigorous instructions, the jury returned a verdict for the plaintiffs.

The District Court's reversal of the judgment was based primarily on this Court's opinion in *Brunswick, supra,* a Sherman Act case which never mentioned *Bruce's Juices* or the Robinson-Patman Act, and upon the Fifth Circuit's opinion in *Payne.* The Court's instructions which were found to be erroneous, were based upon the Robinson-Patman Act, *Bruce's Juices,* and *Fowler v. Gorlick.*

ARGUMENT

I. PAYNE V. CHRYSLER ADOPTS AN IMPRACTICAL AND INSURMOUNTABLE BURDEN OF PROOF.

The heart of the Fifth's Circuit's ruling and the District Court's ruling in *Hasbrouck, et al.,* is the requirement that a plaintiff must prove specific lost sales to the favored purchaser or lost profits resulting from the disfavored purchaser selling at a lowered price to meet the favored purchaser's lower price. Both opinions support

this proposition by reference to the case of *Enterprise Industries, Inc. v. The Texas Co.*, 240 F.2d 457 (2nd Cir.), *cert. denied*, 353 U.S. 965 (1957). *Enterprise* stated a burden of proof which, if adopted by this Court, effectively emasculates private enforcement of the Robinson-Patman Act. *Enterprise* citing *ICC v. Campbell*, 289 U.S. 385 (1933) held that only the following damages could be recovered:

> "If by reason of the discrimination, the preferred [purchasers] have been able to divert business that would otherwise have gone to the disfavored [purchasers], damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the [disfavored purchasers] to sell at a lowered . . . price . . . , damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more." 240 F.2d at 460 (quoting from *ICC v. Campbell*, 289 U.S. 385 at 390-91) (Citation Omitted).

ICC v. Campbell, supra, 289 U.S. 385 (1933), involved a case decided and a statute enacted several years before the enactment of the Robinson-Patman Act. The Eighth Circuit, in *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945), specifically rejected the damage reasoning under the Interstate Commerce Act contained in *Campbell*, finding it inapplicable and inconsistent with the Robinson-Patman Act. 150 F.2d at 996. The Ninth Circuit in *Fowler Mfg. Co. v. Gorlick, supra*, also specifically addressed the *Enterprise* measure of damages and rejected it, stating:

> ". . . it would seem apparent that such a direct-damage right would more effectively serve to curb the discrimination which Congress viewed as being most often exercised against smaller competitors, and whose abolition it sought to accomplish

primarily for that reason, than the more difficult consequential-damage rule of the *Enterprise* case." 415 F.2d at 1251

However, because *Payne* and *Hasbrouck* resurrect the *Enterprise* burden of proof and impose it upon the plaintiff, this Court must determine whether or not such a burden of proof is consistent with its prior opinions involving the Robinson-Patman Act as well as its opinions encouraging private enforcement of the antitrust laws.

A. Proof of Lost Sales Are An Impractical and Insurmountable Burden of Proof

The first element of proof under *Enterprise, Payne* and *Hasbrouck* requires a showing of diverted profits caused by customers going to the favored purchaser as opposed to the disfavored purchaser. This standard is insurmountable in a business such as the gasoline business. For instance, the gasoline market involves numerous suppliers and sellers and customers who carry many different credit cards and are free to select from many sellers and brands. The decision to purchase is greatly influenced by price but price cannot be isolated as the sole factor in a decision to purchase. While the proof in a case such as *Hasbrouck, et al.,* establishes the importance of price, the competitive nature of the industry, and different sales volumes, it would be an insurmountable barrier to determine which of the hundreds of thousands of actual and potential gas customers at any particular time went to which station and for what reason. No records exist from which the lost purchaser or sale can be extracted. While the effect on competition and business is apparent from the proof, it is impossible to isolate and then measure the lost sale as the element of damage.

The Supreme Court has previously recognized the consequence of such a restricted requirement for proof of damages in *Hanover Shoe v. United Shoe Mfg. Corp.*, 392 U.S. 481 (1968), and rejected such an impractical and impossible standard of proof in a Sherman Act case. No purchasers would be able to isolate in any particular purchase of gasoline all of the factors which went into the decision to purchase from one service station dealer as opposed to another. However, it would be obvious that the price of the product in a market would tend to attract business to the lower priced dealer and away from the higher priced dealer. To prove the specific customer and sale loss would require proof of the facts of every purchase and potential purchase made in the market including an analysis of all the factors other than price which may influence such a purchase. The antitrust trial would be interminably long and, in effect, the private party would be unable to present such proof.

The consequences of the *Payne* decision, its predecessors and progeny can be realized by considering the situation involved in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). In that case, Morton Salt Company sold its best brand of table salt at a per case price to large customers which was slightly lower than the price to other customers. The proof showed that the price differential translated into a one-half cent difference in the retail purchase price of a 26-ounce package of Morton Salt, and that salt was a relatively minor item in the purchasing retailer's inventories. Notwithstanding this apparently small effect, the Court found that the statute had been violated. The Court said:

> "Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially

more for their goods than their competitors had to pay." 334 U.S. at 46-47.

This Court must consider how a grocer would now successfully sue Morton Salt Company as was done by the Federal Trade Commission if it had to show specific lost sales of purchasers of salt. Obviously, the grocery store patron could not isolate its decision to purchase salt or patronize the store solely on the price of salt in any particular grocery store. Like the gasoline dealer, the grocer could not prove the lost sale resulting from the higher price. And yet, the impact of a ½ cent price difference even on such a small item as salt has been recognized by this Court. The *Payne* decision would in effect prevent the small merchant selling products for which there are substitutes and many other sellers and purchasers from recovering under the Act.

B. Proof of Profits Lost From Lowered Prices Presents An Impractical and Insurmountable Burden of Proof.

The second measure of damage which *Enterprise, Payne* and *Hasbrouck* recognize arises where it can be proven that the disfavored purchaser sells at a lower price in response to a lower price posted by the favored purchaser. These Courts indicated that the purchaser could recover only to the extent of the reduction in his price. The analysis made previously concerning the purchaser of Morton Salt applies with respect to proof of the amount of a reduction resulting from the price discrimination. If the disfavored grocer lowered his price for Morton Salt, he would have great difficulty showing that he lowered his price because of the favored grocer's price on Morton Salt, rather than in response to the price of other brands of salt, lower labor costs, or other factors that are involved in setting retail price. He also may not have lowered his price thereby selling at a competitive disadvantage. This Court's opinion in

Hanover Shoe, supra, specifically recognizes the impact of such a burden of proof on the trial of antitrust cases as well as on private enforcement of the antitrust statutes. Requiring a showing of a specific reduction in price is another way of stating that the passing on defense is still viable. In *Hanover Shoe,* the Court stated:

> "We are not impressed with the argument that sound laws of economics require recognizing this [the passing on] defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. . . . Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.
>
> "In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." 392 U.S. 492-494.

The insurmountable obstacle created by *Payne* in adopting the passing-on defense of *Enterprise, supra,* and the consequent disastrous effect on private enforcement of the antitrust laws are ample reason to reject the requirement of proof of lost sales and profits under the Robinson-Patman Act and the adopting of the damage rule permitted by *Bruce's Juices* and *Fowler v. Gorlick.*

II. BRUNSWICK CORP V. PUEBLO BOWL-O-MAT, INC., 429 U.S. 477 (1977), DOES NOT OVERRULE OR AFFECT THE COURT'S PREVIOUS STATEMENT OF DAMAGES IN BRUCE'S JUICES.

The Fifth Circuit and the District Court have cited *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* as in some manner holding that "antitrust injury" is different than injury resulting from proof of price discrimination, stating that the plaintiffs in *Payne* and in *Hasbrouck, et al.,* have not proven "antitrust injury." *Brunswick* was a merger case under the Sherman Act in which the Court stated that the injury must flow from the violation and the injury must be an "antitrust injury." 429 U.S. at 489. Therein, the plaintiff complained that the defendant had rescued a financially insecure competitor of the plaintiff, thereby reducing the profits of the plaintiff because of continued competition from the failing competitor. It was logically pointed out by the Court that a *decrease* in competition was not the type of damage contemplated by the Sherman Act and therefore was not "antitrust injury." 429 U.S. at 489. These words do not add anything to the requirements of proof under the Robinson-Patman Act. Certainly, the Court had antitrust injury in mind in *Bruce's Juices* when it found that the amount of discrimination was a proper measure of damages under the Robinson-Patman "antitrust" statute. The fact that the word antitrust is used to describe injury does not mean that the Supreme

Court in *Bruce's Juices* did not consider the measure of damages therein to be injury under the antitrust laws. From a reading of *Bruce's Juices*, it is obvious that the Court was of the opinion that the amount of discrimination was a damage necessarily flowing directly and proximately from the wrongful price discrimination.

III. AN AWARD OF DAMAGES BASED UPON THE AMOUNT OF THE DISCRIMINATION IS CAUSALLY RELATED TO THE PROOF OF ACTUAL INJURY.

The Fifth Circuit has characterized *Payne's* reliance upon *Bruce's Juices* as one of the "automatic" damages unrelated to proof of actual injury. That is not the case. *Payne*, as did *Hasbrouck, et al.*, provided substantial evidence of injury in fact but was not able to measure that injury by specific lost sales or profits. Proof of the fact of damage was done in numerous ways. In both *Hasbrouck, et al.*, and *Payne*, the plaintiffs proved that because they were required to charge their customers a higher price for the same products sold by the favored purchaser, of necessity they would lose sales to the favored customer who was charging a lower price. In both cases, it is an elementary economic principle and was proved at the trial that a person charging a lower price for the same product will attract sales from the person who is required to charge a higher price. In *Hasbrouck*, the proof of intense competition in the gasoline industry in Spokane, the proof of substantially lower pump prices posted by the favored purchasers, and the dramatic increase in sales made by the favored purchasers in comparison to the disfavored plaintiffs, established that the plaintiffs of necessity would lose customers and sales to the favored purchaser. The problem which arises is in measuring the exact amount of those lost

sales. The only realistic and practical measure of damage was the price discrimination.

Recovery of the amount of discrimination is a conservative, minimum measure of actual damage, for it does not compensate many kinds of damage which flow from a price discrimination. For example, it gives no recovery at all when a plaintiff loses an actual sale; it applies only to those sales which the plaintiff, while subject to the discrimination, was in fact able to sell. It does not compensate for lost related sales in their business such as mechanical services, automobile repair, etc. or for increased costs in competing through means other than price. Such uncompensated losses are significant. For instance, when a plaintiff loses a sale, he loses not only the amount of the price discrimination but his entire profit margin. Recovery of the amount of discrimination hardly authorizes a windfall recovery. Each payment of an illegally high price reduces the amount of capital in the plaintiff's business by that amount. This reduction in capital is of necessity a direct business injury. The amount of the discrimination is an actual loss directly and solely caused by the fact of discrimination.

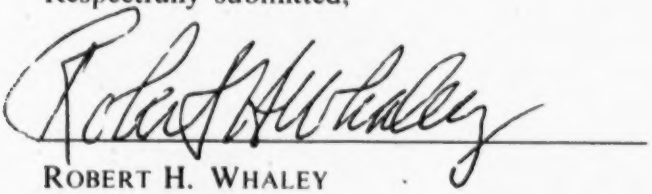
CONCLUSION

Adoption of a measure of damages which permits recovery of the price discrimination is logically sound and fosters compliance with the Robinson-Patman Act. Once the illegality of the price and injury to competition and business have been proven, there is no reason in logic or in policy to permit the defendant to retain the charge wrongfully exacted from the disfavored purchaser. To allow the violator to keep the benefits of an illegal price contravenes the fundamental principle that a wrongdoer may not escape liability

simply because his violation has made its proof more difficult. *Story Parchment Paper Co. v. Patterson*, 282 U.S. 555 (1931). The Fifth Circuit and the District Court in *Hasbrouck, et al.*, have departed from this Court's direction in *Bruce's Juices, supra*, and holding in *Hanover Shoe, supra*. Unless this Court reverses the judgment of the Fifth Circuit Court of Appeals and reaffirms its position in *Bruce's Juices, Hanover Shoe*, and the cases which have followed them, it will have effectively relegated the Robinson-Patman Act to a meaningless proscription which cannot be redressed by injured parties.

DATED this 20th day of November, 1980.

Respectfully submitted,



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